No. 11650

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. W. FOWLER and U. Z. FOWLER,
Appellants,

vs.

CROWN-ZELLERBACH CORPORATION,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 870 Brannan Street, San Francisco 6-26-47—60

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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For Appellee.

In the District Court of the United States
For the District of Oregon

No. Civ. 2734

H. W. FOWLER and U. Z. FOWLER,
Plaintiffs,

vs.

CROWN-ZELLERBACH CORPORATION,
Defendants.

COMPLAINT
ACTION AT LAW FOR DAMAGES, ETC.

Plaintiffs complain against the defendant and for their first cause of action allege as follows:

I.

That plaintiffs are husband and wife and are citizens and residents of the State of Oregon, and that the defendant is a corporation organized, licensed and existing under and by virtue of the laws of the State of Nevada; and that there is a complete diversity of citizenship existing between the plaintiffs and the said defendant.

II.

That these plaintiffs are the owners, as tenants by the entirety, of a parcel of land comprising approximately 16.25 acres, abutting upon Lake Tahkenitch, in the County of Douglas and State of Oregon, and have there invested a large amount of

money with the purpose of operating the said property as a recreational resort. That the chief assets of the said property as a recreational resort and for the successful operation of that business lie in the facts that the said property is on the said lake front; that by reason of the location thereof on said lake it gets the benefit of the beauties of the lake and the shorelines thereof; that the said lake is, under normal conditions, an excellent fishing and boating lake, ideal for both purposes, with great quantities of tule beds lying along the margins of said lake, and that said property is also adjacent to the ocean beach, being approximately one mile therefrom, and that under normal conditions the beach and the approaches thereto from the outlet of said lake are beautiful and attractive; and that also there is adjacent to the highway that passes immediately by the entrance to plaintiffs' said property a public boat landing in the U. S. Forest Reserve, at which boats navigating the said Lake Tahkenitch can land, and adjacent to which boat landing there is convenient level space for the parking of motor vehicles.

III.

That these plaintiffs obtained their said title to said property by mesne conveyances from the said defendant, which, under date of January 10, 1938, conveyed the said real property by special warranty deed to Ross R. Dean and G. M. Dean, brothers, of Gardiner, Douglas County, Oregon, which said deed was duly recorded in Volume 99 of the Deed Records for Douglas County, Oregon, at page 253. That

the said defendant sold and conveyed the said real property to the said Dean brothers as and for a recreational resort and charged and received from the said vendees a price commensurate with the value of said property for adaptation to that purpose, charging and receiving for said real property from said vendees the full sum of $9,500.00. That in the said transaction between the said defendant and said Dean brothers it was contemplated and understood between the parties thereto that the said property conveyed by said deed was to be used as a recreational resort and would be kept in a condition attractive to tourists and others seeking recreation at a resort having the advantages of a fresh water lake of great beauty, ideal for fishing and boating, and also convenient to a beautiful ocean beach.

IV.

That in the early summer of 1944 these plaintiffs opened their said property for business as a recreational resort, but that for some time prior thereto it had been becoming increasingly apparent that the defendant was attempting to force plaintiffs to discontinue the maintenance of their said property as a recreational resort, and were seeking to "step up" a logging operation which was being conducted by the defendant in that vicinity and was determined to have no interference with said logging operation or any delay or stoppage thereof that might or could result from reasonable efforts on its part to keep the said lake in a fairly navigable condition for rowboats and power boats and in a

fairly good condition as a fishing lake, and the lake, the lake outlet, and the ocean beach in a reasonably attractive condition as a recreation area, for which purpose said area had been set apart by the National Forest Reserve, and which condition obtained at the time the Dean brothers purchased from Crown-Zellerbach Corporation and continued down to and including the time when plaintiffs became the owners of said real property. That in this regard defendant Crown-Zellerbach Corporation in its said logging operation had been falling, and continued to fall, trees directly into the said lake, destroying the tule beds along the margins of the said lake, which tule beds were and are necessary to the reasonable fish feeding and propagation and spawning of fish in said lake; had been sawing logs in the lake, permitting the sawdust and pitch and other saps from the tree trunks to mix with the waters of the lake, also to the detriment of fish life in said lake; had strung logging cables across the lake with one end attached to a donkey engine and the other anchored on the opposite side of the lake so that when the line would slacken most thereof would lie beneath the surface of the water, but upon being tautened by the drum of the donkey engine would rise with great force out of the water, falling again, and thereby constituting such a menace to safety as to keep fishermen and others from seeking to navigate the lake, either in rowboats or power boats; had installed boom sticks in the lake for booming logs at various places thereof, leaving the same without any lights or other warnings for the safety of per-

sons who might be navigating the lake in boats in the nighttime, or might desire to do so; had permitted numerous "flotus" from their logging operations to go out upon the surface of the lake in various places, some partially and some almost completely submerged (depending upon individual weight and floatability) whereby boating on the lake, either for fishing or for pleasure riding, was and is rendered extremely dangerous; had so conducted their said logging operations that the unboomed logs and snags, tree tops and other debris from said logging operations customarily floated into and blocked boat passages provided in bridge trestling crossing the lake, so that boats were and are unable to pass from one side of the trestles to the other, thereby making impossible the complete and satisfactory navigation of the lake; had "swamped" many fallen trees in the lake, permitting the slashings from such swamping operations to float about the lake and to lodge along the margins of the lake, and finally to drift, together with old snags, limbs, stumps and other debris resulting from the said logging operations of said defendant, down into the channel of said lake's outlet to the ocean, there to be scattered about in an unsightly "mess" upon the beach and upon the lands adjoining the said outlet, all of which were, and except for the action of the defendant still would be, of great beauty, and a valuable adjunct to plaintiffs' said property as a recreational resort; and have commenced and are constructing an un-

sightly logging camp immediately adjoining said property of these plaintiffs, and somewhat below the grade of the cottages standing upon the property of these plaintiffs, [By order 9/10/45 VOB] and have commenced and are constructing an unsightly noisy logging camp immediately adjoining said resort property of these plaintiffs, and somewhat below the grade of the cottages standing upon the property of these plaintiffs, and have installed thereon a work-shop for repairing heavy machinery and which operates a trip-hammer with action so violent as to vibrate cabins on plaintiffs' said property, and has and did ostentatiously cut down the fringe of trees which served as a natural screen or partial screen, and the sole barrier that would have tended to obscure the obnoxious view of said camp from the property of these plaintiffs, and that, to some extent, would have preserved the naturally beautiful setting of plaintiffs' said property; that these plaintiffs are informed and believe, and therefore do allege and say on such information and belief, that the said camp is constructed and being constructed in such manner that the sewage therefrom empties directly into the lake and close to the swimming float on plaintiffs' property. Also in the conduct of its said logging operation said defendant operates a number of tugs and launches on said lake, and in the operation thereof runs said tugs, etc., at such a speed by and adjacent to plaintiffs' said property that the swimming floats and other improvements built by plaintiffs along the shore line of their property have been and are being grievously

injured and weakened by the force of the water and wash thereof by the said tugs when speeded past said floats. That said injury has been so great that some of the logs under said floats have been loosened and displaced and the diving tower heretofore maintained by plaintiffs on one of the said floats was so wrecked and weakened that it was recently blown over, all to plaintiffs' great damage. Also that said defendant, by threats that it intended to "get" the plaintiff H. W. Fowler, and by reason of a violent assault and battery committed by said defendant through one of its agents upon both of the plaintiffs and upon a guest in the house of the plaintiff, has made it appear unsafe that the plaintiffs should even remain on the said premises; and the plaintiffs, each for himself or herself, and each for the other, stand in fear that the defendant will cause great bodily harm to come to one or both of said plaintiffs. That said acts of said defendant continue unabated, and the inevitable destruction thereby of plaintiffs' said investment is the deliberate purpose of the said defendant.

V.

That by reason of the facts hereinbefore set forth said property of the plaintiffs has been and is rendered of little or no value as a recreational resort, and plaintiffs have lost [By Order 6/22/45 VOB] and will lose much of the normal income therefrom all to plaintiffs' damage in the full sum of $50,000.00; and that the said facts hereinbefore alleged constitute a private nuisance which these plaintiffs claim the right to have abated in the manner provided by law. That said defendant's said

conduct was and is malicious and wanton, and in some respects criminal, by reason of which it should be required to pay punitive damages in the further sum of $100,000.00.

As a second cause of action against the said defendant plaintiffs affirmatively allege:

I.

Re-affirm and re-allege Subdivisions numbered I, II and III of the first cause of action in this complaint, making the same by this reference a part and parcel of this second cause of action.

II.

That adjacent to the said property of these plaintiffs there has heretofore been set apart by the Forest Service of the United States of America a recreational area which includes thereon a public boat landing on Lake Tahkenitch, with parking space for automobiles and other vehicles by which boats may be brought to the said lake, or in which people may come to make use of the boating facilities and fishing facilities on said lake. That while the said landing is a public boat landing and is in general use by the public, including some people who reside on or near the said Lake Tahkenitch, and including others who come there habitually for fishing and boating, the destruction or rendering useless of said boat landing and said parking space and said portion of said recreational park is especially injurious to these plaintiffs, and they suffer special and extraordinary damage from the destruction or impairment thereof by reason of the fact that they own

the property acquired by them by mesne conveyances from the defendant corporation, which property is fitted and designed to be used as a recreational resort, and the said boat landing and the said parking facilities adjacent thereto were and are of great value to these plaintiffs as an adjunct to the use of their said property as a recreational resort.

III.

That plaintiffs are informed and believe, and therefore do allege and say, that the defendant has obtained from the Forest Service of the United States a special permit to install a log-dump at or near the present location of the said public boat landing, and is now in process of preparing the said property at said place for use as a log-dump to be used by the defendant in connection with its logging operations in that vicinity.

IV.

That the logging operations of said defendant at that point are of great proportions, and the use of said place and property as a log-dump for defendant's said logging operations will render the said public boat landing and the said parking space so dangerous that it will be of no use whatever to the public, to which public these plaintiffs belong, and that these plaintiffs will be peculiarly injured and damaged by the installation of the log-dump at said place by reason of the fact that they are the owners of the said recreational resort property heretofore mentioned and referred to, the value of which is

greatly enhanced by the public boat landing facilities heretofore existing on the government reserve adjacent to plaintiffs' said property.

V.

That the installation of said log-dump at the place selected by defendant and provided for in the special permit issued by the Forest Service hereinbefore mentioned and referred to, will result in special injury to plaintiffs as aforesaid, to their damage in the full sum of $10,000.00, and will constitute a nuisance which plaintiffs claim the right to have abated in the manner provided for by law.

Wherefore plaintiffs demand judgment against the defendant on their first cause of action in the full sum of $150,000.00; and on their second cause of action in the full sum of $10,000.00; and also for their costs and disbursements herein. And these plaintiffs reserve the right to move the Court for an order allowing a warrant to issue, directing the abatement of the private nuisance described in plaintiffs' first cause of action, and also for the abatement of the nuisance described in plaintiffs' second cause of action.

/s/ HOY & PRAG,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 3, 1945.

State of Oregon,
County of Douglas—ss.

I, H. W. Fowler, being first duly sworn, depose and say that I am one of the plaintiffs in the above-entitled cause; and that the foregoing Complaint is true, as I verily believe.

/s/ H. W. FOWLER.

Subscribed and sworn to before me this 2nd day of April, 1945.

[Seal] /s/ M. F. WRIGHT,
Notary Public for the State of Oregon.

My commission expires April 21, 1945.

[Title of District Caurt and Cause.]

AMENDED ANSWER TO FIRST CAUSE OF ACTION

Comes now the defendant and for its amended answer to the first cause of action as set forth in the complaint herein admits, denies and alleges:

I.

Admits the allegations of paragraph I thereof.

II.

Answering paragraph II thereof admits that the plaintiffs are the owners by the entirety of a parcel of land comprising approximately sixteen (16) acres, abutting upon Lake Tahkenitch, Douglas

County, Oregon, and have there made investments for the purpose of operating said property as a recreational resort, but this defendant alleges that such investments were also made for the purpose of operating said property as an auto court and as a motel; admits that one of the assets of said property as a recreational resort is the fact that said property is located on said lake, and by reason of such location said property is benefited; admits that said lake is now, and for many years last past has been, a lake upon which boats may be operated and fishing may be followed; admits that tule beds are located along certain of the shore lines of said lake and that the property is approximately one mile from the ocean beach but with reference to the proximity of said property to the ocean beach this defendant alleges that the said beach is not visible from said property and that said beach can be reached only by arduous trudging over soft sand dunes; and admits that adjacent to the coast highway, which passes immediately by the entrance to said property of the plaintiffs, there is a boat landing in the U. S. Forest Reserve, at which small boats may be launched into said lake or taken from said lake, and that adjacent to said boat landing there is now, and for some time has been, a convenient level space for the parking of motor vehicles.

III.

Answering paragraph III thereof admits that the plaintiffs obtained title to said property by mesne conveyances from the defendant, which, under date

of January 10, 1938, conveyed the said real property by special warranty deed to Ross R. Dean and G. M. Dean, brothers, of Gardiner, Douglas County, Oregon, which said deed was duly recorded in Volume 99 of the Deed Records for Douglas County, Oregon, at page 253.

IV.

Answering paragraph IV thereof admits that the plaintiffs in 1944 operated said property as a recreational resort but alleges also that the plaintiffs operated said property in 1944 as an auto court and motel; admits that the defendant conducted its logging operations upon the shores of said lake but alleges that the defendant so conducted its logging operations in a proper, reasonable, lawful and workmanlike manner; admits that in such conduct of its logging operations around, in and upon said lake the defendant did at times operate a log cut-off saw but alleges that the operation of said saw was warranted and reasonable in the conduct of said logging operations and that any sawdust from said sawing operation was in a trifling and inconsequential amount and in no way adversely affected the plaintiffs in the use and operation of their said property; admits that in such logging operations the defendant, at times, stretched logging cables across the narrowed areas of said lake and, in the reasonable and proper operation of said cables, the same would be tautened so as to raise such cables from the waters of said lake and, upon the release of said cables, the same would drop into the waters of said

lake; admits that the defendant installed boom sticks in said lake for the booming and holding of logs and admits that such boom sticks were not lighted at night and alleges in that regard that the maintenance of such boom sticks was a proper, reasonable and lawful conduct of its logging operations and that there was no traffic upon such lake which would justify any lighting of such boom sticks; admits that logs of the defendant sometimes drifted in the waters of said lake but alleges in that regard that any such drifting of logs was brought about by the breaking up of log storage because of storms of unusual severity, and further alleges that the defendant, in the reasonable conduct of its operations immediately collected any such drifting logs and replaced the same in storage; admits that the defendant has cleared the outlet of said lake to the ocean and alleges that such clearance benefited the recreational and fishing possibilities of said lake; admits that the defendant cut down a fringe of trees located between the property of the plaintiffs and the logging camp of the defendant but alleges that such fringe of trees was cut down upon the express order of the Safety Division of the Industrial Accident Commission of the State of Oregon and that said Division, in issuing said order, was acting with authority under the statutes of the State of Oregon and that the defendant was required, under such statutes, to comply with said order; admits that the defendant in the conduct of its logging operations operated a small number of tow boats and launches upon said lake.

V.

Denies each and every allegation in said first cause of action contained except as hereinbefore or as hereinafter in the further and separate answer of this defendant may be expressly admitted, stated or qualified, which further and separate answer is, for the purpose of this denial, hereby referred to and made a part hereof.

AMENDED ANSWER TO SECOND CAUSE OF ACTION

Comes now the defendant and for its Amended Answer to the second cause of action as set forth in the complaint herein, admits, denies and alleges:

I.

Answering paragraph I thereof reaffirms and realleges its answers to paragraphs I, II and III of the first cause of action of the plaintiffs as such answers are hereinbefore pleaded.

II.

Answering paragraph II thereof the defendant admits that adjacent to the property of the plaintiffs is an area over which the Forest Service of the United States of America has jurisdiction and which includes a public boat landing upon said lake, with parking space for automobiles and other vehicles.

III.

Answering paragraph III thereof the defendant admits that it has received from the Forest Service of the United States a permit to install a log-dump

in said area which is under the jurisdiction of said Forest Service and admits that it has constructed and is now operating said log-dump under and in accordance with the terms of said permit.

IV.

Denies each and every allegation in said second cause of action contained except as hereinbefore or hereinafter in the Further and Separate Answer of this defendant may be expressly admitted, stated or qualified, which Further and Separate Answer is, for the purpose of this denial, hereby referred to and made a part hereof.

FURTHER AND SEPARATE ANSWER

Comes now the defendant and for its Further and Separate Answer to each and both of said causes of action, alleges:

I.

That the defendant is a corporation of the State of Nevada and duly licensed and qualified to do business in the State of Oregon under the foreign corporation laws of the State of Oregon.

II.

That plaintiffs are husband and wife and own approximately sixteen (16) acres of land in Section 29, Township 20 South, Range 12 West of the Willamette Meridian abutting upon Lake Tahkenitch, Douglas County, Oregon, which said property was

acquired by said plaintiffs from C. H. Cook and wife by deed dated April 13, 1943.

III.

That the defendant and its predecessor in title have for more than ten years last past owned the lands which are adjacent to the shores of said lake; that said lands of the defendant were, when purchased by the predecessors of the defendant, covered with timber which was ripe for logging; that the defendant since 1937, and its predecessors in title before 1937, have been continuously engaged in the logging of said lands abutting upon said lake; that the defendant has universally conducted its said logging operations in a reasonable, warranted and lawful manner, and any conduct of such logging operations other than in a reasonable, warranted and lawful manner has been of isolated and infrequent occurrence and has not constituted any nuisance to the plaintiffs and has not caused the plaintiffs any damage.

IV.

That the plaintiffs, well knowing that the defendant had for many years been carrying on such logging operations and intended to continue to carry on such operations, did, in 1943, purchase said property with the intent of using the same as a recreational resort, as an auto court and as a motel.

V.

That the plaintiffs have not been legally damaged by any operations of the defendant and any damage which the plaintiffs may have suffered in their in-

vestment in, or in their income from said property and/or in the conduct of their said business in operating said property, has been solely and only due to two facts, to-wit:

(1) The gasoline shortage resulting from war restrictions which has markedly limited public travel to and from said properties of the plaintiffs; and

(2) The incompetent and bad management of the plaintiffs in the conduct of said business, particularly referring to (1) the continual opening and closing of the resort so that the public could not depend upon admittance to said resort, and (2) the manifestation of an antagonistic attitude toward the defendant and its employees which has resulted in driving away the custom and trade of many of the employees of the defendant who are there engaged in said logging operations and has alienated the custom and trade of the relatives, friends and acquaintances of such employees.

VI.

That the defendant has spent large sums of money in reforesting the logged-off land in the Lake Tahkenitch area, and it is the intent and purpose of the defendant, as a post-war activity when manpower and materials may be available, to reforest all of the logged-off lands in said area. That this defendant has never at any time pursued any course of conduct with a purpose of in any way or wise damaging the plaintiffs and has tended strictly to its own business in lawfully carrying on its logging operations.

VII.

That with reference to any assault and battery upon the plaintiff H. W. Fowler as alleged in Paragraph IV of the first cause of action, the defendant alleges that it is informed and believes that the plaintiffs refer to an assault and battery on July 4, 1944, made by Bert Ross upon the defendant Plaintiff [By order 6/22/45 VOB] H. W. Fowler and with reference to said assault and battery this defendant alleges:

(1) That such assault and battery was not made by said Ross within the scope of any agency relationship existing between the defendant and said Ross and was not authorized by the defendant either directly or impliedly and this defendant has no responsibility therefor; and

(2) That such assault and battery was justified and provoked by the conduct, threats and language of said H. W. Fowler with respect to the said Ross and his employment, and the plaintiffs should be and are estopped from making any legal complaint of that which was so justified and provoked.

Wherefore, this defendant demands judgment for its costs and disbursements herein.

/s/ CASSIUS R. PECK,
GRIFFITH, PECK, PHILLIPS & NELSON,
Attorneys for Defendant.

[Endorsed]: Filed June 18, 1945.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and pursuant to authority granted them in open court, supplement their second cause of action against the defendant, affirmatively alleging in connection therewith as follows:

I.

That since the commencement of the above-entitled action and prior to the filing of this Supplemental Complaint the log-dump at or near the present location of the public boat landing, referred to in subdivision III of plaintiff's second cause of action in their original complaint, has been completely installed and the defendant is using the same for dumping logs and is rafting the logs on the lake in front of the property of these plaintiffs and is pulling the said logs through the tule beds along the shores of the said lake.

That the said defendant installed said log-dump and is operating the same under a special permit from the Forest Service of the United States, which these plaintiffs are informed and believe, and, therefore, do allege and say grants the said special permit for the period of one (1) year with a provision that it may be renewed.

II.

That the operation of said log dump for said defendant's said logging operation has rendered, and will continue to render the said public boat landing

and the parking space adjacent thereto so dangerous that they are, and will be, of no use to the public; and that these plaintiffs are, and in the future will be, peculiarly injured and damaged by the said operation of said log dump at said place by reason of their ownership of the said recreational-resort property mentioned and referred to in plaintiffs' original complaint, and the value of which was greatly enhanced by the public boat landing facilities which existed on the Federal Government Reserve at or near said boat landing and adjacent to plaintiffs' said property.

III.

That by reason of the facts herein, and in plaintiffs' original complaint set forth in the second cause of action thereof, these plaintiffs have been, and are, damaged in the full sum of $10,000.00.

Wherefore, these plaintiffs renew the prayer of their original complaint on file in the above-entitled Court and case.

HOY and PRAG,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 29, 1945.

[Title of District Court and Cause.]

ANSWER TO SUPPLEMENTAL COMPLAINT

Comes now the defendant and for its Answer to the Supplemental Complaint herein admits, denies and alleges:

I.

Answering paragraph I thereof admits that the defendant has completely installed the log-dump referred to in said paragraph I and is using the same for dumping logs; admits that the defendant has installed said log-dump and is operating the same under a special permit from the Forest Service of the United States; admits that said permit is granted for a period from March 1, 1945, to February 29, 1946, and is subject to further extension if requested in writing.

II.

Denies each and every other allegation contained in said Supplemental Complaint except as hereinbefore may have been expressly admitted, stated or qualified.

Wherefore this defendant demands judgment for its costs and disbursements herein.

/s/ CASSIUS R. PECK,
/s/ GRIFFITH, PECK, PHILLIPS & NELSON,
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 2nd day of July, 1945.

/s/ HARVEY G. HOY,
Attorney for Plaintiffs.

[Endorsed]: Filed July 2, 1945.

[Title of District Court and Cause.]

ORDER AUTHORIZING AMENDMENT TO COMPLAINT

Pursuant to and in conformity with a stipulation entered into by and between the parties through their respective attorneys:

It Is Hereby Ordered that the complaint in the above-entitled suit may be further amended by changing the clause found in lines 14 to 17, inclusive, on page 4 of the complaint to read as follows: "and have commenced and are constructing an unsightly, noisy logging camp immediately adjoining said resort property of these plaintiffs, and somewhat below the grade of the cottages standing upon the property of these plaintiffs, and have installed thereon a work-shop for repairing heavy machinery and which operates a trip-hammer with action so violent as to vibrate cabins on plaintiffs' said property." That said amendment may be made either by interlineation or by striking out with a pen the said clause beginning with the first word "and" on line 14 of page 4 of said complaint down to and including the word "plaintiffs" on line 17 of said complaint and placing a rider on said page 4 containing the words of the clause as amended pursuant to this order.

It Is Further Hereby Ordered that when the complaint is so amended, the amended answer of the defendant, as heretofore filed herein, shall stand as an answer to the complaint as so amended and the new matter of the complaint as inserted by said

amendment shall be deemed to be denied by said amended answer of the defendant.

Dated Sept. 10th, 1945.

/s/ CLAUDE McCOLLOCH,

O.K. Cassius R. Peck, of Attorneys for Defendant.

O.K. Harry G. Hoy of Attorneys for Plaintiffs.

[Endorsed]: Filed September 10, 1945.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Appearances:

Attorneys for Plaintiff, Hoy and Prag.

Attorneys for Defendant, Griffith, Peck, Phillips and Nelson; John J. Coughlin, and Wilbur Beckett Oppenheimer; Mautz & Souther.

Character of Action

This is an action by the plaintiffs, H. W. Fowler and U. Z. Fowler, against the defendant, Crown Zellerbach Corporation, to recover damages. In their Complaint and in their Supplemental Complaint plaintiffs set up two causes of action. By their first cause of action they ask for $50,000.00 compensatory and $100,000.00 punitive damages, which they allege they suffered by reason of certain acts alleged against the defendant which they claim has reduced the value of property owned by them, as hereinafter

described, and by reason of loss of the normal income from said property; and in this cause of action they claim that the acts and conduct of defendant and the manner in which it has maintained its logging operations on and near Lake Tahkenitch, constitute a private nuisance and allege that the conduct of the defendant has been malicious and wanton.

By their second cause of action, as set forth in their Supplemental Complaint, the plaintiffs ask damages in the sum of $10,000.00 against the defendant on the ground that the defendant has installed a log-dump at or near the location of a public boatlanding on said Lake Tahkenitch near the property of the plaintiffs which constitutes a nuisance, injuring the business and said property of the plaintiffs.

The pleadings of the defendant disclose that it contends that the defendant has conducted its logging operations upon its lands adjacent to said Tahkenitch Lake in a reasonable manner and that the plaintiffs have suffered no damage by reason of any acts of the defendant; that if plaintiffs have suffered any loss of value of, or loss of income from their properties adjacent to said Lake, such damage has been solely and only due to (1) the gasoline shortage resulting from war restrictions which markedly limited public travel to and from the said properties of the plaintiffs, and (2) the incompetent and bad management of the plaintiffs in the conduct of said business, particularly referring to (a) the continual opening and closing of the resort so that

the public could not depend upon admittance to said resort, and (b) the manifestation of an antagonistic attitude toward the defendant and its employees which has resulted in driving away the custom and trade of many of the employees of the defendant who are there engaged in said logging operations and has alienated the custom and trade of the relatives, friends and acquaintances of said employees.

General Description of the Premises Involved in the Controversy

The property of the plaintiffs, the easterly portion of which borders upon Tahkenitch Lake, has been improved with cabins, floats and boats for a recreational resort on said Lake. It abuts upon Lake Tahkenitch on the westerly shore thereof and is cut from north to south of the improved Coast Highway. To the North of the northern extremity of plaintiff's said property, and on the westerly shoreline of said Lake is a public boat-landing. This boatlanding is reached from plaintiffs' said property either by traveling the highway which crosses a branch of the Lake immediately north of a portion of plaintiff's property or by water by navigating the Lake from the easterly side of plaintiffs' property to said boatlanding.

A log-dump has been installed by the defendant approximately 75 feet northerly from said boatlanding on the shore of said Lake, which is the log-

dump of which plaintiffs make complaint in their second cause of action.

The defendant owns property on the lake front immediately South of said property belonging to the plaintiffs and has built on its said property a logging camp southerly of and within a short distance of plaintiffs' resort property, which camp is somewhat lower in elevation than most of the property of the plaintiffs and to which said camp an artificial channel from said Lake has been constructed.

Plaintiffs acquired title to their said property consisting of approximately 16.25 acres from one C. H. Cook by deed dated April 13, 1943.

The defendant, for many years last past, has been conducting a logging operation upon its lands adjacent to the said Lake Tahkenitch.

Admissions

The following facts are admitted by the parties plaintiff and defendant:

(1) That plaintiffs are husband and wife and are citizens and residents of the State of Oregon and that the defendant is a corporation licensed and existing under the laws of the State of Nevada and domesticated in the State of Oregon.

(2) That the plaintiffs are the owners as tenants by the entireties of the said parcel of land, comprising approximately 16.25 acres on Lake Tahkenitch, Douglas County, Oregon, having invested therein for the purpose of operating said property as a recreational resort, auto court and motel.

(3) That one of the assets of said property as a recreational resort is the fact that said property is located on said Lake and thereby benefits from the fact that the Lake is, and long has been, a lake upon which boats may be operated and fishing may be indulged in as a sport; that tule beds are located along certain of the shorelines of said Lake, and that the property of the plaintiffs is approximately one mile from the ocean beach.

(4) That adjacent to the Coast Highway, which passes immediately by the entrance to the said property of the plaintiffs there is a boat-landing of the United States Forest Reserve at which small boats may be launched into said Lake and taken therefrom and that adjacent to said boat-landing there is now, and for some time has been, a convenient level space for the parking of motor vehicles.

(5) That the plaintiffs operated their property in 1944 as a recreational resort, auto court and motel, and that the defendant conducted its logging operations upon its lands adjacent to said Lake, and that the defendant did at times operate a log cut-off saw, sawing logs in the waters of said Lake Tahkenitch.

(6) That in its said logging operations the defendant at times stretched logging cables across portions of the Lake and in the operation of said cables the same would be at times tautened so as to raise such cables from the waters of the Lake and upon the release of said cables the same would drop into the waters of the Lake.

(7) That the defendant in connection with its

logging operations installed boom sticks for the booming and holding of logs, and such boom sticks were not lighted at night.

(8) That the logs of the defendant sometimes drifted in the waters of said Lake.

(9) That the defendant cut down a fringe of trees located upon the property of the defendant and between the said property of the plaintiffs and the said logging camp of the defendant.

(10) That the defendant in the conduct of its logging operations operated a small number of tow-boats and launches on said Lake.

Issues to Be Tried by Reason of Plaintiffs' Contentions

First: Did the defendant in connection with its said logging operation during said time fall, and continue to fall, trees directly into the Lake, destroying tule beds along the margin of the Lake?

Second: Did the defendant in its said logging operations unnecessarily saw logs in the said Lake, permitting the sawdust, pitch and other saps from the tree trunks to mix with the waters of the Lake?

Third: Did the defendant conduct its logging operation in such a manner that it unnecessarily permitted numerous floaters from its logging operations to go out upon the surface of the Lake in various places, some of which would be partially, and some almost completely, submerged and whereby boating on the Lake either for fishing or for pleasure riding was rendered dangerous?

Fourth: Did the defendant so conduct its said

logging operations that unboomed logs and snags, tree tops and other debris from its said logging operation customarily floated into and blocked passages provided under bridge trestling crossing the Lake so that boats were unable to pass from one side of the trestles to the other?

Fifth: Did the defendant unnecessarily swamp fallen trees in the Lake permitting the slashings from such swamping operations to float along the Lake and to lodge along the margins of the Lake and finally to drift together with old snags, limbs, stumps and other debris resulting from defendant's logging operations down into the channel of said Lake's outlet to the ocean and to be scattered on the beach, rendering the beach unsightly?

Sixth: Did the defendant construct a logging camp in which it installed a workshop for repairing heavy machinery which operates a trip hammer with action so violent as to vibrate cabins on plaintiffs' said property, and the noises from which camp constituted an unnecessary annoyance to persons occupying plaintiffs' said property?

Seventh: Does the sewage from said camp of the defendant render unsafe and unsanitary the said Lake Tahkenitch close to the swimming float on the property of the plaintiffs?

Eighth: Has the defendant in the operation of its said logging business operated tugs and launches on the Lake unnecessarily and in such a manner as to injure the underpining and substructure of the floats on plaintiff's property?

Ninth: Did the said conduct of the defendant in

the operation of its tugs and launches loosen and displace the logs under plaintiffs' floats and cause the diving tower maintained by plaintiffs on one of said floats to become so wrecked and weakened that it was blown over?

Tenth: Did the defendant, through its agent, or agents, make threats to the plaintiff H. W. Fowler that it intended to "get" him; and did it cause a violent assault and battery to be committed by one of its agents upon the plaintiffs and upon a guest in the house of the plaintiffs; and has the defendant made it appear unsafe for the plaintiffs to remain on the premises?

Eleventh: If it be determined that any act of the defendant, as specified in the foregoing paragraphs "First" to "Tenth" inclusive, occurred continuously and not as an isolated act, and that such act was unwarranted or unreasonable in the reasonable operation of the business of the defendant, and that the defendant committed such act either for the purpose of causing an invasion of the rights of the plaintiffs, or knew that such act would result in injury to the plaintiffs' property or the plaintiffs' business, or both, and if it be further determined that such act resulted in a substantial damage of the plaintiffs' property or the plaintiffs' business, or both, then it is for the jury to determine how much, if any, was the value of said property of the plaintiffs reduced by the said conduct of the defendant, and how much, if any, did the plaintiffs lose of the normal income from their said property as the result of such act or acts.

Twelfth: If it be determined that any act of the defendant, as specified in the foregoing paragraphs "First" to "Tenth" inclusive, occurred continuously and not as an isolated act, and that such act was unwarranted or unreasonable in the reasonable operation of the business of the defendant, and that the defendant committed such act with malice, and if it be further determined that such act resulted in a substantial damage of plaintiffs' property or the plaintiffs' business, or both, then it is for the jury to determine how much, if any, punitive damages should be awarded the plaintiffs.

Issues to Be Tried by Reason of the Contentions of the Defendant

First: The property of the plaintiffs is located approximately one mile from the ocean beach and said beach is not visible from said property and can be reached only by arduous trudging over soft sand dunes, and by reason of the remoteness of said ocean beach from said plaintiffs' property, the plaintiffs have no special interest in said ocean beach and cannot be heard to complain with respect to the effect of the operations of the defendant upon said ocean beach.

Second: That the operation by the defendant of a log cut-off saw in said Lake was warranted and reasonable in the conduct of its logging operations and any sawdust from said sawing operations was in a trifling and inconsequential amount and in no way adversely affected the plaintiffs in the use and operation of their property.

Third: That the maintenance of boom sticks upon said Lake without lights was a proper, reasonable and lawful conduct of the logging operations of the defendant and there was no traffic upon such Lake which would justify any lighting of such boom sticks.

Fourth: That any drifting of logs of the defendant upon the waters of said Lake was brought about by the breaking up of log storage because of storms of unusual severity, and the defendant, in the reasonable conduct of its operations, immediately collected any such drifting logs and replaced the same in storage.

Fifth: That the clearance by the defendant of the outlet of the said Lake to the ocean has benefited the recreational and fishing possibilities of said Lake.

Sixth: In cutting down the fringe of trees located upon the property of the defendant and between the property of the plaintiffs and the logging camp of the defendant, the defendant acted upon express orders of the Safety Division of the Industrial Accident Commission of the State of Oregon, and the defendant, under the Statutes of the State of Oregon, was required to comply with said order.

Seventh: That the defendant constructed and operated a log-dump upon said Lake Tahkenitch upon government lands and under and in accordance with the conditions of a permit therefor issued to the defendant by the Forest Service of United States.

Eighth: That the defendant and its predecessor in title have for more than ten years last past owned the lands which are adjacent to the shores of said Lake and that said lands of the defendant were, when purchased by the predecessors of the defendant, covered with timber which was ripe for logging; that the defendant since 1937, and its predecessors in title before 1937, have been continuously engaged in the logging of said lands abutting upon said Lake; that the defendant has universally conducted its said logging operations in a reasonable, warranted and lawful manner and any conduct, as contended by the plaintiffs, of such logging operations other than in a reasonable, warranted and lawful manner have been of isolated and infrequent occurrances, and has not constituted a nuisance to the plaintiffs and has not caused the plaintiffs any damage.

Ninth: That the plaintiffs well knowing that the defendant intended to carry on such logging operations, did, in 1943, purchase said property with the intent of using the same as a recreational resort, as an auto court and as a motel.

Tenth: That the plaintiffs have not been legally damaged by any operations of the defendant and any damage which the plaintiffs may have suffered in their investment in, or in their income from said property and/or in the conduct of their said business in operating said property, has been solely and only due to two facts, to-wit:

(1) The gasoline shortage resulting from war restrictions which has markedly limited public travel to and from said properties of the plaintiffs; and

(2) The incompetent and bad management of the plaintiffs in the conduct of said business, particularly referring to (1) the continual opening and closing of the resort so that the Public could not depend upon admittance to said resort, and (2) the manifestation of an antagonistic attitude toward the defendant and its employees which has resulted in driving away the custom and trade of many of the employees of the defendant who are there engaged in said logging operations and has alienated the custom and trade of the relatives, friends and acquaintances of such employees.

Eleventh: With reference to the alleged assault and battery by Bert Ross upon the said H. W. Fowler on July 4, 1944 the defendant contends:

(1) That such alleged assault and battery was not made by said Ross within the scope of any agency relationship existing between the defendant and said Ross and was not authorized by the defendant either directly or impliedly and the defendant has no responsibility therefor; and

(2) That such alleged assault and battery was justified and provoked by the conduct, threats and language of said H. W. Fowler with respect to the said Ross and his employment, and the plaintiffs should be and are estopped from making any legal complaint of that which was so justified and provoked.

Reservations by Plaintiffs of Points of Law

Upon Pre-Trial the Court overruled the contention of the plaintiffs with respect to the following proposition at law and the plaintiffs reserve the right to hereafter present and urge such propositions in the further trial of this case:

(1) That the issue as tendered by the plaintiffs to the effect that a part of the consideration for the payment of $9,500.00 to the defendant by the Dean Brothers for the sixteen and a fraction acres acquired by the plaintiffs by mesne conveyance from the defendant was the understanding that the property should be used as a recreational resort and that that character of the transaction created in effect an implied covenant running with the land to the effect that the Grantor in the deed to Dean Brothers would carefully conduct or manage or operate its adjoining properties so as not to unnecessarily injure or impair the said property as a recreational resort.

Reservations by Defendant of Points of Law

Upon pre-trial the Court overruled the contentions of the defendant with respect to the following propositions of law and the defendant reserves the right to hereafter present and urge such propositions in the further trial of the case:

(1) That the issues as raised by the plaintiffs with respect to the assault and battery upon

the plaintiffs and upon a guest in the house of the plaintiffs are not proper issues to be considered in this case, which is founded upon establishment of a nuisance, under Section 8-401 Oregon Compiled Laws Annotated, and in which damages are asked only for the depreciation of the property and the loss of income from property.

(2) That the issue as raised by the plaintiffs with respect to the establishment and operation of a log-dump upon the lands of the United States under a permit from the Forestry Service of United States is not a proper issue to be considered under the pleadings of this case, and such issue should be stricken from further consideration for the reason that the same is not supported by the pleading of any facts which would support the retention of such issue.

Exhibits Offered and Marked at Pre-Trial

All exhibits produced by each and both of the parties to the action were marked for identification at the Pre-Trial subject to offer and further consideration of the Court at the time of the trial of the case; a schedule and list of said exhibits is attached hereto, made a part hereof and marked Exhibit "A."

Plaintiffs objected to defendant's Pre-Trial Exhibits Nos. 1 to 23 inclusive; also, to Defendant's Exhibits Nos. 30 to 33; and also, to Defendant's Exhibits Nos. 36 to 44 inclusive, and also to De-

fendant's Exhibits Nos. 46 to 48 inclusive. For the most part the objection was based upon the ground that the exhibit objected to was irrelevant and immaterial. In certain cases where copies were offered further objection was made that these copies were not the best evidence.

At the time of Pre-Trial the court overruled the motion of the defendant for a view by the jury of the premises and at that time it was stipulated that the defendant should be permitted to take photographs of the premises involved in litigation and offer the same at the trial without having presented the same for identification at the Pre-Trial. In accordance with such stipulation, the defendant reserves the right to present such photographs at the Pre-Trial without first having presented the same at the Pre-Trial.

Order of Court

Based upon a hearing before this Court, plaintiffs appearing in person and by Harry G. Hoy of their attorneys and the defendant appearing by its duly authorized representative and Cassius R. Peck, John J. Coughlin and Robert T. Mautz of its attorneys, it is hereby

Ordered, Considered and Adjudged that the foregoing constitutes the Pre-Trial Order in the above entitled action and shall supersede the pleadings, and that the Pre-Trial Order shall not be amended in the trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 13th day of November, 1945.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed November 13, 1945.

In the District Court of the United States for the District of Oregon

No. Civ. 2734

H. W. FOWLER and U. Z. FOWLER,
Plaintiffs,

vs.

CROWN ZELLERBACH CORPORATION,
Defendant.

JUDGMENT FOR DEFENDANT

The above entitled action came on regularly for trial before the undersigned on the 8th day of May, 1946, and a jury was duly impanelled and sworn; by direction of the court the jury was thereupon taken to view the localities where the matters and things involved in the pleadings transpired, and said trial was resumed on May 14 and continued until May 15, 1946. At the conclusion of all the testimony and after all parties had rested defendant made a motion that the court direct a verdict in favor of the defendant and against the plaintiffs and decision of said motion was reserved and said

cause was on the 16th day of May, 1946, submitted to the jury. On the 17th day of May, 1946, the jury not having returned a verdict for either party but advising the court that in their opinion no verdict could be agreed upon was discharged, and defendant within ten days after the jury had been discharged filed a motion for judgment in accordance with its motion for a directed verdict.

Defendant's said motion for judgment having been argued to the court by attorneys for the respective parties and the court having considered said motion finds that it should be and the same is hereby granted.

It is therefore hereby Ordered and Adjudged that plaintiffs recover nothing and that their complaint and action be and the same are hereby dismissed.

It is further Ordered and Adjudged that defendant have and recover of and from plaintiffs its costs and disbursements incurred herein taxed at $1,756.92, and that execution issue therefor.

Dated this 25th day of June, 1946.

CLAUDE McCOLLOCH,
Judge.

Due and legal service of the within proposed Judgment by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 24th day of June, 1946.

/s/ HARRY G. HOY,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed June 25, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Crown Zellerbach Corporation, defendant, and to Cake, Jaureguy and Tooze and John J. Coughlin, its attorneys:

Notice is hereby given that H. W. Fowler and U. Z. Fowler, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered in the above-entitled case on or about the 25th day of June, 1946, which provided that the plaintiffs recover nothing and that their complaint and action "be and the same are hereby dismissed" and which further provided that the defendant recover of and from the plaintiffs its costs and disbursements incurred in said action, said judgment being the only final judgment heretofore, or at all, made and entered in the above entitled action. Said plaintiffs appeal from the whole of said judgment and from each and every part thereof.

Dated September 24th, 1946.

HOY & PRAG,
Attorneys for Plaintiffs.

[Endorsed]: Filed September 24, 1946.

[Title of District Court and Cause.]

BOND ON APEAL

4846988

Know All Men by These Presents, that We, H. W. Fowler and U. Z. Fowler, as Principals, and Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto Crown Zellerbach Corporation, defendant, and to whom it does or may concern, in the full and just sum of Two Hundred Fifty and no/100 ($250.00) Dollars to be paid to the said Crown Zellerbach Corporation, its attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of September, 1946.

Whereas, lately at a District Court of the United States for the District of Oregon, in an action pending in said Court between H. W. Fowler and U. Z. Fowler as plaintiffs and Crown Zellerbach Corporation as defendant, a judgment was rendered against the said plaintiffs, and the said plaintiffs having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid case on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco in the State of California, or at such other proper place as the Court may see fit to hold said session.

Now, the condition of the above obligation is such,

that if the said H. W. Fowler and U. Z. Fowler shall prosecute their said appeal to effect, or shall pay all costs, interest and damages for delay if for any reason the appeal is dismissed, or if the judgment is affirmed, being such costs and disbursements as the appellate court may adjudge and award, if said appellants fail to make their appeal good or prevail therein, then the above obligation to be void; else to remain in full force and virtue.

[Seal] H. W. FOWLER,
[Seal] U. Z. FOWLER,
Appellants
[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By CLARENCE D. PORTER,

Countersigned:

JOHN H. RANKIN AGENCY,
/s/ JOHN H. RANKIN,
Resident Agent.

[Endorsed]: Filed September 24, 1946.

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

Apr. 3—Filed complaint.
Apr. 3—Issued summons—to marshal.
Apr. 6—Filed summons with marshal's return.
Apr. 24—Filed demurrer.

1945

Apr. 24—Filed answer of defendant.

Apr. 25—Filed demand for jury.

Apr. 25—Filed motion of ptff. to strike from answer.

May 7—Record of hearing of Pltf's motion to strike from answer, U. A. McC.

May 7—Record of hearing of Deft's demurrer, U. A. McC

May 7—Entered order setting for P. T. on Wed., June 13, 1945. McC

May 28—Entered order setting for P. T. on Friday, June 22, 1945. McC

June 18—Filed motion of Deft. to strike parts of complaint.

June 18—Filed amended answer.

June 22—Record of Pre-trial Conference. McC

June 22—Entered order to correct Complaint & Amended Answer by interlineation. McC

June 22—Oral motion by Pltf. for order granting leave to file supplemental complaint. U. A. McC

June 29—Filed supplemental complaint.

July 2—Filed answer of Deft. to supplemental complaint.

Aug. 30—Filed transcript Pre-Trial Proceedings June 22, 1945.

Sept. 10—Filed stipulation.

Sept. 10—Filed and entered order authorizing amendment to complaint. McC

Oct. 4—Filed Index of Pre-trial exhibits, Defts. 1-107, Pls. 108-128 J4.

1945

Oct. 16—Entered order setting for trial Tuesday, Nov. 13, 1945. (attys. notified) McC

Oct. 26—Entered order setting for further P. T. Thursday, Nov. 1, 1945. (attys. notified) McC

Oct. 31—Issued original subpena, & 35 copies to defendant.

Nov. 2—Record of Pre-trial conference. McC

Nov. 2—Entered order overruling demurrer. McC

Nov. 2—Entered order reserving decisions on legal questions until time of Trial. McC

Nov. 2—Entered order reserving decisions on motion to strike from answer. McC

Nov. 5—Issued 2 civil subpoenas & 16 copies.

Nov. 8—Filed further pretrial proceedings transcript dated Nov. 2, 1945.

Nov. 13—Record of trial begun—jury impaneled & sworn—evidence adduced. McC

Nov. 13—Filed & entered Pretrial order. McC

Nov. 14—Record of trial—evidence adduced. McC

Nov. 15—Record of trial—evidence adduced. McC

Nov. 16—Issued subpoena for plntf. and 7 copies.

Nov. 16—Record of trial—evidence adduced. McC

Nov. 17—Record of trial—evidence adduced. McC

Nov. 19—Record of trial—evidence adduced. McC

Nov. 20—Filed motion for directed verdict.

Nov. 20—Order excusing Juror Mrs. B. C. Rue because of illness—oral stipulation of counsel to continue with 11 Jurors—Order to continue with 11 Jurors. McC

1945

Nov. 20—Record of hearing on Deft's motion for directed verdict—order reserving decision. McC

Nov. 20—Record of trial, evidence adduced—closing argument. McC

Nov. 21—Record of trial—Jury unable to agree. McC

Nov. 21—Entered order dismissing jury from further consideration of this case. McC

Nov. 21—Filed exhibits. J-4

Nov. 28—Filed motion for Judgment (by deft.) with notice attached.

1946

Jan. 21—Entered record of hearing on motion of deft. for judgment—argued & taken under advisement.

Feb. 9—Entered order denying motion of deft's for judgment, order setting for further pre-trial on Feb. 18, 1946 at 2 p.m. and order setting for trial on March 7, 1946. Attys. notified McC

Feb. 16—Filed motion for postponement of trial date with affidavit.

Feb. 18—Entered record of pre-trial & hearing on motion of deft. to continue cause for trial & order continuing to further order pre-trial & motion. McC

Feb. 21—Entered order striking trial date of March 7, 1946. attys. notified. McC

Mar. 4—Entered order allowing ptff. to file amended complaint & continuing for trial setting. McC

1946

Mar. 16—Filed motion of ptff. to set for trial.

Apr. 1—Entered order setting for trial on May 8, 1946—10 a.m. (Jury) McC

Apr. 1—Filed & entered order to deliver exhibits. McC

Apr. 11—Issued subpoena & 12 copies to ptff's atty.

Apr. 22—Filed & entered Order for Withdrawal of exhibits until Apr. 25, 1946.

Apr. 18—Filed vol. I and II, transcript of trial proceedings.

May 8—Issued original & 20 copies of subpoenas to atty.

May 8—Entered order consolidating this cause with Civ. 3057 for trial to make available evidence in this cause for use in Civ. 3057; record of trial, order for view and order to resume court trial on May 14, 1946 after view. Person Rep. McC

May 14—Record of trial. Person Rep. McC

May 15—Record of trial & order to withdraw certain exhibits. Person Rep. McC

May 16—Record of trial; order reserving decision on motion of deft. for a directed verdict in its favor.

May 16—Entered order for meals. McC

May 17—Entered record of trial (jury deliberating) & order discharging jury (disagreement) McC

May 21—Filed motion of deft. for judgment.

May 21—Filed exhibits on 2nd trial numbered 49, 140, 119, 107-D, 40, 39, 24, 135, 38, 187, 37, 2, 134, 133, 132 and 188. J-4.

1946

May 24—Entered order setting argument on motion of deft. to dismiss for June 5, 1946—10 a.m. (not heard) McC

June 14—Entered order setting hearing on motion of deft. for a judgment in its favor on June 24, 1946—10 a.m. attys. notified. McC

June 24—Record of hearing on motion of deft. for judgment & entered order allowing motion. McC

June 25—Filed & entered judgment for deft. attys. notified. McC

June 26—Filed defendant's cost bill.

June 28—Entered costs in Lien Docket.

Sept. 17—Filed judgment roll.

Sept. 24—Filed notice of appeal.

Sept. 24—Filed bond on appeal.

Sept. 24—Mailed copies of Notice on Appeal—to attys.

Oct. 25—Filed stipulation enlarging time for filing designation of record.

Oct. 25—Filed & entered order allowing to Dec. 21, 1946 for filing designation of record on appeal. McC

Dec. 6—Time for appeal extended by C. C. of A. to and including March 10, 1947.

Dec. 6—Time for appeal extended by C. C. of A. to and including June 10, 1947.

1947

May 29—Filed stipulation re contents of record.

May 29—Filed in duplicate excerpts from trial proceedings.

May 29—Filed in duplicate transcript of cross examination of Mrs. U. Z. Fowler.

[Title of District Court and Cause.]

STIPULATION IN RE RECORD

It is hereby Stipulated between the parties to the above-entitled action that the following mentioned parts of the record, proceedings and evidence are to be included in the record on appeal:

(1) The pleadings upon which the case was tried, particularly including the Complaint and the Amended Answer. (The Supplemental Complaint and the Answer thereto could be of no assistance to the Court.)

(2) The Pretrial Order.

(3) A transcript of the testimony of Mrs. U. Z. Fowler, which is herewith filed with the Clerk of the above-entitled Court.

(4) A transcript of an offer of proof and of a portion of the Court's instructions, which is this day filed with the Clerk.

In view of the fact that it has been impossible to obtain a transcript of the testimony in this case and in order that the appellants may have a record of an alleged error upon which to base their appeal,

It Is Further Hereby Stipulated that throughout the last trial of this case the Trial Judge consistently ruled that no damages could be predicated upon any alleged act of the defendant occurring later than July 9, 1944, because prior to that date plaintiffs had announced that on and after that date their report would be closed to the public and on and after that date the plaintiffs had

excluded the general public from the premises and had built a fence between their premises and the public highway and had used the premises thereafter only as their residence and for the housing and entertainment of special guests whom they were willing to accept and who made special reservations to enter the premises for recreational purposes; whereas, the plaintiffs, through their counsel, excepted to such ruling and contended that they should be entitled to damages on any wrongful act of the defendant resulting in injury to their property or property rights referred to in the pleadings.

The defendant by executing this Stipulation does not concede that the portions of the record referred to in this Stipulation are sufficient to adequately present to the appellate court any question which appellants may endeavor to present to that court, but expressly reserves the right to maintain that the record is not sufficient for that purpose. Both parties also expressly reserve the right to supplement the transcript on appeal by additional portions of the record, including additional portions of the transcript of testimony if and when it becomes possible to obtain such transcript.

Dated this 29th day of May, 1947.

/s/ HARRY G. HOY,
Attorney for Plaintiffs.
/s/ NICHOLAS JAUREGUY,
Of Attorneys for Defendant.

[Endorsed]: Filed May 29, 1947.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 35 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 2734, in which H. W. Fowler and U. Z. Fowler are plaintiffs and appellants and Crown-Zellerbach Corporation is defendant and appellee; that said transcript has been prepared by me in accordance with the stipulation in re record on appeal filed by appellants and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said stipulation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of Cross-Examination of Mrs. U. Z. Fowler and a duplicate transcript of Excerpts from Trial Proceedings.

I further certify that the cost of comparing and certifying the within transcript is $18.75 and that the same has been paid by appellants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 5th day of June, 1947.

[Seal] LOWELL MUNDORFF,
Clerk.
By /s/ F. L. BUCK,
Chief Deputy.

In the District Court of the United States
for the District of Oregon

Civil No. 2734

H. W. FOWLER, et ux,

Plaintiffs,

vs.

CROWN ZELLERBACH CORPORATION,
a corporation,

Defendant.

Portland, Oregon, Wednesday, May 15, 1946

Before: Honorable Claude McColloch, Judge.

Appearance:

Mr. Harry G. Hoy, Attorney for the Plaintiffs.

Mr. Nicholas Jaureguy, Attorney for the Defendant.

Alva W. Person, Court Reporter.

MRS U. Z. FOWLER

one of the Plaintiffs, was produced as a witness on behalf of the Plaintiffs and, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Jaureguy:

Q. As I understand it, Mrs. Fowler, you are the bookkeeper? A. Yes, sir.

Q. Who takes charge of the books, and I sup-

(Testimony of Mrs. U. Z. Fowler.)

pose you have a record showing all the money that is taken in? That is, somebody comes in and pays you, you put that in the cash book, the cash received, we would call it?

A. Well, that is all taken care of in the books.

Q. That is all in the books? A. Yes, sir.

Q. But you didn't bring the books along?

A. No, sir.

Q. Did you and Mr. Hoy discuss as to whether you should or should not bring the books?

A. No. He never mentioned it to me and I never thought of it.

Q. Now could you tell us the gross, all the money that was taken in at your resort between the first day of January, 1944, and the 9th day of July, 1944? A. No, I could not.

Q. Could you tell us within five thousand dollars?

A. I could not, because I keep my books on a yearly basis.

Q. On a yearly basis?

A. And I would have to take my adding machine and go through everything to get it for that period of time.

Q. So, as I understand it, you could not tell us within five thousand dollars of the amount of money taken in between January 1st and July 9th, 1944?

A. I could not.

Q. Could you tell us within $3,000.00 what expenses you had between the first day of January and the 9th day of July, 1944?

(Testimony of Mrs. U. Z. Fowler.)

A. Well, that would be the same story. Those are not broken down there.

Q. You could not tell us within $3,000.00?

A. No.

Q. Could you tell us the amount that was charged in 1944 for depreciation?

A. Depreciation is something that my auditor takes care of altogether. I don't have anything to do with that. At the end of the year he figures all of that out.

Q. Yes, but could you tell us—you have looked at the books, I guess? A. That is right.

Q. From your recollection of the books could you tell us the amount that was taken for depreciation? A. Not in any set year, no.

Q. I beg pardon?

A. Not in any set year, no, because it varies, naturally.

Q. I remember in answer to one of Mr. Hoy's questions you said that the net loss of $2800.00 for 1944 was after taking depreciation?

A. That was the net loss, as shown on our income taxes, I remember it.

Q. So you remember that figure from the income tax?

A. Yes, because that is the total for the year.

Q. If that was the income tax returned that must have shown the depreciation, didn't it?

A. It did show it, yes, sir.

Q. Can you remember anything else that en-

(Testimony of Mrs. U. Z. Fowler.)

tered into the result for 1944 other than what you say as the net loss?

A. No, because that is the only figures we ever try to remember from year to year, is what the total was, because if I remembered them all I would not have room in my head for anything else.

Q. As I understand you, you keep the books?

A. That is right.

Q. As I understand it, you could not tell within $5,000.00 the amount taken in from the 1st of January to the 9th of July? I want to ask you if you can recall within $5,000.00 what was taken in during the entire year of 1944?

A. I don't know what those figures were.

Q. You think you could tell us within $10,000.00?

A. You would just have me guessing if I did that and I don't think that would amount to anything.

Q. I don't want you to guess, if you could not tell from what you know came in, or what. So you could not tell except as a guess?

A. That is right.

Q. Within $10,000.00? A. That is right.

Q. Mr. Fowler, you will remember, said that even while you were open there sometimes in the middle of the week you had some cabins that were not occupied?

A. That is right. You are bound to have cabins that are not occupied.

Q. Was that frequent or was it all the time?

A. Well, it varied a great deal. That depends a little on how many people move out on us, too.

(Testimony of Mrs. U. Z. Fowler.)

Q. During the middle of the week did you ever have to turn away people because your cabins were all filled? A. We have, yes.

Q. And during week ends did you have to turn away people because your cabins were filled?

A. Yes, we have.

Q. That was rather frequent, I suppose?

A. On week ends, yes.

Q. That was in both 1943 and 1944?

A. Yes, sir.

Q. I think Mr. Fowler said when you closed your resort on July 9th you had to cancel all your cabins because they were all full?

A. Yes. I remember we were completely filled on that day.

Q. Had you been turning away people there from the 1st of July to the 9th of July?

A. From the 4th of July. From the 1st to the 9th? That is when I have to always turn people away, because that is when everybody wants to come.

Q. How many people would you say you turned away in comparison with those you took? Did you turn away more than you took?

A. No, I would not say so.

Q. About the same?

A. No. I would say if we took sixteen cabins every day we would not turn away that many people.

Q. In June, 1944, did you have to turn away a lot of people?

(Testimony of Mrs. U. Z. Fowler.)

A. Oh, it would probably be about the same. Maybe a little less.

Q. You would turn away a few less than you took in; is that what you mean?

A. No. I mean a few less than in July.

Q. Than in July. And from May 13th, when you opened up, until the last of May, did you have to turn away people?

A. Not so many, but I imagine we did on week ends. Pretty near always on week ends.

Q. But during any of that period from May 13th to July 9th was there any time during the week ends that you were not filled up?

A. As I remember it, I believe we were practically always filled on week ends. Now, of course, there might be a cabin here and there, but you can't really take that into consideration.

Q. Yes. And many times during the middle of the week you were filled up during that period of time, weren't you? A. Often, yes.

Q. Often?

A. Then again we would not be.

Q. Now your cabins, what is the rate on your cabins?

A. We have cabins that go all the way from a dollar and a half a night to seven dollars a night.

Q. One and a half to seven. Could you tell us what the average is? In other words, when we have, say, sixteen filled one night what is that?

A. During my lunch hour I figured it out. It would be sixty-four dollars a night.

(Testimony of Mrs. U. Z. Fowler.)

Q. $64.00 a night. Well, I suppose we might say that $64.00—I suppose we might say on the average during that period you were two-thirds filled up, weren't you?

A. Well, that is awfully hard to estimate.

Q. Yes. Well, would you say my guess there is pretty close?

A. Two-thirds? That I don't know.

Q. Well, you ought to be able to guess better than I can about it?

A. Well, you are doing the guessing. I am trying to tell you what I know.

Q. Yes. Well, would you say that on the average in 1944, while you were open, between the 13th of May and the 9th of July, on the average you were two-thirds filled up during the middle of the week and taking the whole time together?

A. Well, there have been times during the middle of the week when we have had hardly anyone there. Then again we have had people. That is what makes it so hard to tell.

Q. I am just asking the general average, or I might get at it this way. I am not sure whether I asked this question or not, or whether you can tell us the total amount you took in from the 13th of May to July 9th, 1944?

A. I told you that I could not tell you.

Q. Can you tell me the approximate amount?

A. Please don't get me guessing.

Q. No, I don't want to get you guessing now. I am trying to get at some other way. You could

(Testimony of Mrs. U. Z. Fowler.)

not help me either, whether saying on the average, just taking that entire period of one and two-thirds of a month, whether on the average you were filled up?

A. Because that is a long while to try to remember figures in your head.

Q. That is right. Now in arriving at the figure of $28,000 net loss did you make deductions for improvements that you put on the cabins?

A. Improvements are capital gain and not deductible as an expense.

Q. I think I remember that there is something on it. Repairs, I take it, though——

A. Repairs are deductible as an expense, yes.

Q. That is an expense. That is the distinction between improvements and repairs?

A. Yes. They make quite a definite distinction.

Q. Sometimes it is hard to draw the line, though?

A. That is one of the serious problems of a bookkeeper.

Q. That is right. I think you said you put in a lot of repairs in '44?

A. A lot of repairs and a lot of improvements both.

Q. Because, as I understand your testimony, from the 1st of January, 1944, to the 13th of May, I think you said you merely took in enough guests to fill the houses that you were not working on?

A. Well, if you are working on one you could not earn anything on it.

(Testimony of Mrs. U. Z. Fowler.)

Q. That is what I say. And I got the impression there were quite a few you were working on?

A. Well, we try to never work on too many at one time. We try to get one finished and ready and then start the next one.

Q. Now I want to ask you another question. If you can't answer it, all right. I will get through pretty soon, Mrs. Fowler. Could you give us some account of an estimate of the amount in 1944 that was deducted for repairs?

A. You ask me to remember too far back on that, too.

Q. Just what I thought. Now did this twenty-eight thousand dollar loss——

Mr. Hoy: Twenty-eight hundred.

Q. (By Mr. Jaureguy): This twenty-eight hundred dollar loss—did this twenty-eight hundred dollar loss include any salaries for anybody there?

A. That twenty-eight hundred dollar loss for the year?

Q. Yes.

A. That included the help we had during the period they were employed, yes, sir. That didn't include any salaries or remuneration for either Mr. Fowler or myself.

Q. Living expenses the same way?

A. No. Living expenses we paid ourselves, naturally.

Q. I am thinking of the living expenses for the help.

A. Well, on that it depends. If you make your

(Testimony of Mrs. U. Z. Fowler.)

board and room, you charge them so much on their wages as a set schedule on that.

Q. Do you remember the latter part of May, 1944, when you decided to close down the resort and was out just for your own home?

A. I heard that the other day, but that is not the truth.

Q. You don't agree then with Mr. Fowler?

A. No. He might have been talking to someone and made some such remark. No, that was not our plan, and that item in the paper was not put in there for publication. We did not have anything to do with putting that in the paper.

Q. You heard Mr. Fowler say that that was true, that you did plan, and you told the editor of the paper that you were closing as of the last of May and turning it into a private home?

Mr. Hoy: If your Honor please, I object to that. I don't believe it is a correct statement of Mr. Fowler's testimony, as I understand.

The Court: The jury will have to decide.

Q. (By Mr. Jaureguy): Do you remember that testimony?

A. Well, may I tell it as I remember it?

Q. Well, no. I say, do you remember the testimony?

A. I remember him testifying, yes, sir.

Q. To that effect?

A. Well, oh, I thought he said he was talking to the editor of the paper, and he might have made

(Testimony of Mrs. U. Z. Fowler.)

some such remark. However, that was nothing that Mr. Fowler and I had planned together.

Q. Well, he not only made the remark but it was all true, except the last few words when he had referred to a mistake. All right. You just tell what the facts were.

A. Frankly, that was something I didn't know anything about until I read in the paper about that.

Q. That is when you first learned you were closing? A. That is right.

Q. It came as sort of a shock to you?

A. No. You could say you laugh when you hear a lot of things at any time.

Q. Yes, but you were surprised anyway, I take it?

A. Yes. But then the next week, as Mr. Fowler, I believe, stated, he talked to the gentleman that edited the paper and he put in an article contradicting it.

Q. Yes, I remember. He testified, too, that there were a lot of protests from people against the closing? A. That was what the paper said.

Q. That is what he said, too?

A. Well then, of course, too, he tried to make things—to smooth it over.

Q. Yes. Well, that was pretty well smoothed over. As I understand it, then, on the 26th of June you wrote that letter, as I understand it, to the Highway Commission——

A. Yes, I wrote that.

(Testimony of Mrs. U. Z. Fowler.)

Q. ——in which you said you were going to close it and put it up for sale?

A. That is right.

Q. That, I suppose, you had talked over with Mr. Fowler? A. Naturally.

Q. Now you heard, of course, Mr. Cook testify a few moments ago? A. Yes, sir.

Q. And about all the cull logs that were let down the outlet in the fall of '42 and spring of '43?

A. Yes, I heard him.

Q. When you visited the beach, when you first bought the place, did you find yourself cull logs down on the beach?

A. I didn't notice any on the beach, no, sir.

Q. Did you notice them any place?

A. I believe there were logs in the outlet.

Q. How far up?

A. I am not very good on distances.

Q. You mean right where the outlet goes into the ocean, or do you mean back a mile, or where?

A. I didn't really notice.

Q. I beg pardon?

A. I didn't really notice up the outlet how far they had gone.

Q. You just noticed——

A. I noticed the beach was nice and let it go at that.

Q. Well, I think I am a little confused, Mrs. Fowler. I will have to get back and ask you whether you noticed any of those cull logs?

A. I believe that I did.

(Testimony of Mrs. U. Z. Fowler.)

Q. And they were at the outlet?

A. Well now, by the outlet do you mean way up at the first part of the outlet?

Q. You see, now, you are getting me confused. I wish you would just tell us where you saw them.

A. Somewhere between the outlet and the ocean, I guess.

Q. Well, that is pretty good. And about how many would you say you saw?

A. I would not attempt to estimate that.

Q. By the way, a very good question. Guess.

A. Well, I couldn't. There were——

Q. So it wasn't very clean when you saw many of them?

A. The beach itself was clean, yes.

Q. You mean by the beach, between low and high water?

A. I mean the sandy beach, where you walk out there and want to walk down to the ocean you go across.

Q. Well, yes. You have been down there at high tide? A. Yes, I think I have.

Q. Been down there at low tide?

A. Yes, sir.

Q. You are referring now to that space between the high tide and low tide?

A. Well, high tide and low tide—well, all along up there it goes from the sand dunes and then it goes right down to little brush stuff, and from there on, I practically considered from there on, I don't

(Testimony of Mrs. U. Z. Fowler.)

know how far up. Probably at extreme high tide it might get up there; I don't know.

Q. But where you say you saw a lot of cull logs and things, after the spring of 1944 there you didn't see any when you were down there before?

A. I beg your pardon?

Q. Well, I guess I will just withdraw it. It is kind of vague—to me, I mean, as well as to you; I will say to me, if not to you. Now do I understand that you made some protests to Crown Zellerbach in the spring of 1944 about anything they were doing, or not doing? I mean you personally. I am not speaking about the letters.

A. Well, I referred to the letters I had written.

Q. Oh, these letters have been in.

A. I believe so. I don't remember the dates on them.

Q. You don't remember any protest except what is in the letters?

A. Well, then I know we discussed it with their superintendent, and that is the only person really that I have ever personally talked to.

Q. Could you give us some idea when you talked to Mr. Ross? I mean on that subject.

A. As to dates?

Q. Yes. A. No.

Q. You couldn't. During 1943 I think you said you had a lot of trouble with your equipment?

A. Yes, we did.

Q. You don't have any complaint about the logging operations themselves during 1943, as I understand it?

(Testimony of Mrs. U. Z. Fowler.)

A. We didn't make any formal complaint on it, because we kept thinking that the things that we saw would be corrected.

Q. Well, those troubles that you had of your own, what were they?

A. Well, they were mainly concerned with our water system. Do you want me to go into that?

Q. Just tell us, but not with too much detail, like you did at the last trial, for instance.

A. Well, we had our water pump break on us. We had a shut down and get a new water pump.

Q. Who helped you put that in? Anybody?

A. I believe there was a Mr. Vaughn did. I believe that was the name of the man that came over and tried to help us.

Q. Somebody from Crown Zellerbach?

A. Yes.

Q. Then what happened?

A. Then our water pipes bursted and we had to get new pipes.

Q. You mean then you had to pump by some other device?

A. We had to keep the water running continually. You see, ordinarily we run the water up in the water tank, then it comes down by gravity into the cabins, but we have a way we can shut that off. It is sort of confusing to me, but the water goes directly through the lines to the cabins, and therefore by keeping the water going——

Q. Did Mr. Ross come over and help you on that?

(Testimony of Mrs. U. Z. Fowler.)

A. Yes, he did. He was very good.

Q. That was Mr. Ross, the superintendent?

A. Yes, sir.

Q. Then what happened?

A. Then the water tank started leaking. We had to get a new water tank.

Q. That was quite a job?

A. The whole thing was quite a job. It took a great deal of time and a great deal of work.

Q. So during 1933—you didn't start in until the 1st of May, as I recall, during 1933—you were shut down the major portion of the time on account of things of that kind?

A. I think you are off your dates. It wasn't '33.

Q. '43, yes. Ten years is not so bad.

A. It makes a little difference.

Q. During that season, 1943, you were shut down a lot of the time because of the things you have been relating? A. Yes.

Q. And similar things. Now these tugboats that you talk about, that is these big boats I mean compared to an outboard motor that we use to tow the logs around—— A. Yes.

Q. ——that is the same type of a boat they used the other day to take the jury out on?

A. I believe it is.

Q. Isn't it a fact those were geared down to about six miles an hour?

A. I never looked at the speedometers.

Q. Well, I won't say geared. I will say you saw

(Testimony of Mrs. U. Z. Fowler.)

how fast they were going? They were going six miles an hour and less, weren't they?

A. Well, the speed would have been comparative. They could have gone somewhat slower and done a great deal less damage.

Q. Mr. Fowler has a pretty nice looking boat there, hasn't he? A. Yes, he has.

Q. How fast does that go when he is out on the lake?

A. You should ask Mr. Fowler that. I believe that it is—I don't know how fast they go, but I know we can't go as fast as the book says we should.

Q. Well, that is generally true, yes. The book says forty-two and it goes thirty-five; isn't that so?

A. Something like that. I was going to say thirty-two to thirty-five. Forty-two, on the other hand, in case that is right.

Q. I wonder if you ever have had occasion to observe the waves from that boat when it is going thirty-five? A. Yes, sir, I have.

Q. How are they?

A. They are entirely a different type of wave than you get from the tugboat.

Q. A different wave length, you mean?

A. Well, on a tugboat your prow, I think you call it, goes down in the front end of the water and it makes a big wave that keeps going like this, and on the speedboat the front end goes up and you sort of skim the water and all you get is a little wash behind. It looks like there is a lot of spray coming out of the sides, and that is not the steep roll that you get from a tugboat.

(Testimony of Mrs. U. Z. Fowler.)

Q. I never thought of that. Maybe there is something to it.

A. I think if you ever watch the boat you will find I am right on that.

Mr. Jaureguy: I will have to watch it. I saw a boat the other day with the front end out that made quite a wave. It didn't happen to be Mr. Fowler's, though. I think that will be all, Mrs. Fowler. Thank you.

Redirect Examination

By Mr. Hoy:

Q. Mrs. Fowler, I think I overlooked asking you what other means of income did you have there besides the cottages and the boats? What other facilities did you have for making money?

A. Well, we had the cottages and boats, and motors; and then we had the store and the restaurant and the gas pumps.

Mr. Jaureguy: I didn't get that. Something, and the restaurant?

A. The restaurant and the store and the gas pumps.

Q. (By Mr. Hoy): Did you also sell a certain kind of gas, or something, some kind of a mix for boats?

A. Yes, we had. That is, for outboard motors and boats like that they mix oil and gasoline to make what they call a gas mix. We sell that.

Q. How does the price on that compare with the price for ordinary gas, do you know?

A. It is higher.

(Testimony of Mrs. U. Z. Fowler.)

Q. So you had—your source of income consisted, as I understand it, of the cottages and the boats, the motors attached to some of the boats, the store, restaurant and gas; is that right? A. Yes, sir.

Mr. Hoy: I think that is all.

Recross-Examination

By Mr. Jaureguy:

Q. Now the restaurant has been shut down nearly all the time from the beginning, hasn't it?

A. No. When we were open to the public, between May 13th and July 9th, it was open all of the time.

Q. Now I have got to ask you another question. Can you give us an approximation of the amount of money during that time you took in from the restaurant?

A. I would not like to guess on that either, Mr. Jaureguy.

Q. Well, to ask you about the other means of income, as I understand it, your principal income has been this cottage that Mr. Fowler talked about, where you got forty——

Mr. Hoy: If your Honor please, we object to that. That has nothing to do with the income that we are talking about.

The Court: Sustained.

Mr. Jaureguy: That will be all.

Mr. Hoy: That is all, Mrs. Fowler.

(Witness excused.)

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, Official Reporter, hereby certify that I reported the proceedings had before the Honorable Claude McColloch, Judge, in the above entitled cause, on Wednesday, May 15, 1946, including the cross-examination of Mrs. U. Z. Fowler; that I thereafter prepared a transcript of the cross-examination of the witness, Mrs. U. Z. Fowler, and the foregoing transcript, pages numbered 2 to 21, both inclusive, contains a full, true and correct transcript of the cross-examination of said Mrs. U. Z. Fowler.

Witness my hand, this 24th day of May, A. D. 1946.

.....

Official Reporter.

[Endorsed]: Filed May 29, 1947.

In the District Court of the United States
for the District of Oregon

Civil No. 2734

H. W. FOWLER, et ux,

Plaintiffs,

vs.

CROWN ZELLERBACH CORPORATION,
a corporation,

Defendant.

EXCERPTS FROM TRIAL PROCEEDINGS

Portland, Oregon, May 16th, 1946

Before: Honorable Claude McColloch, Judge.

Appearances:

Mr. Harry G. Hoy, Attorney for the Plaintiffs.

Mr. Nicholas Jaureguy, Attorney for the Defendant.

* * * * * * * *

Mr. Hoy: If your Honor please, I was wondering when we would make our offer of proof.

The Court: Whenever it is convenient. Are you ready now?

Mr. Hoy: Yes. I might read it into the record.

The Court: Plaintiffs' offer of proof. Just let me read it. I am a fast reader, I suppose. Then you can give it to the Reporter.

Mr. Hoy: I don't know. I probably won't read it as I wrote it.

The Court: Well, go on.

Mr. Hoy: I wrote it last night and I wrote it pretty rapidly. I may change it as I go along.

The Court: Well, if you want to, change it.

Mr. Hoy: I might add to it or subtract from it.

The Court: Yes.

Mr. Hoy: You want me to read it rapidly?

The Court: No.

Mr. Hoy: The plaintiffs offer to prove by testimoney of State Health Officer that the sewage disposal plant of the defendant was improperly installed in violation of the Oregon Statute with reference to installation of sewage disposal plants and was dangerous, and that it was so installed as to be liable to contaminate the water at the swimming and bathing resort of the plaintiffs.

The Court: What date?

Mr. Hoy: I beg pardon?

The Court: What date?

Mr. Hoy: It was installed subsequent to July 9th, 1944, I think. Also that the defendant was warned at the time construction was started that the same was wrong and was dangerous—was warned by a licensed plumber. Second, we would prove by expert testimony of actual tests made by the experts personally that the water at plaintiffs' said bathing beach was and is actually contaminated by these sewers, rendering it unfit for use as a bathing resort.

* * * * * * * *

The Court charged the jury as follows:

This case was tried once before, before a jury,

as I told you, and so I had the benefit of a preview of what to expect and for that reason certain rulings that have been made may appear to have been abrupt to you, but I ask you to take my word for it, ladies and gentlemen, that they were matters that were all threshed out at great length before, a great deal more length than they have taken at this trial and it has been my intention at this trial merely to apply the rulings by which the previous case was concluded. In other words, from my point of view, I want no injustice done to either party by that.

Furthermore, I may tell you that there is another case pending in this court which the plaintiffs have brought against the defendant with the same lawyer, the same lawyers on both sides, what we call an equity case. This case we are trying right now. That other case is the case for an injunction which is brought against the defendant for an injunction against the continuance of certain acts for which damages have been asked here, and incidentally in that case they pray that damages as a matter of law be allowed. As I say, the plaintiff has two cases. The one we are trying here for damages, the sole question before you, and that other case is covering the same situation, in which these damages will be incidental. This testimony you have been hearing here for the last two or three days I have also been hearing in connection with my duties in the other case. That other case is the kind of case where a jury is not called. I just don't want you to get the idea that Mr. Hoy and I have dis-

agreed—I hope not too violently. I don't want you to get the idea that it is arbitrary. There are still matters that I will have to decide after you discharge your duties in this case.

And because that is the way the last case turned out, that the jury question was limited to events in the year 1944, not later than July 9th, 1944, so your inquiry is limited here now to that period. It seemed to me then, and does now, that these plaintiffs could not claim damages of the defendant on any theory after the time when they decided, for their own reasons, to close their property, and that is why your consideration stops at that date. They didn't have to close their property. They may have thought they did have to but that does not settle it. The question is whether they could claim damages against somebody else for a period after the time when they, exercising their own right as property owners closed the property. They did close it, and so that closes their claim against the defendant as far as this case is concerned, for any time after that.

The measure of damages, should you allow any, is what profits they lost during the period in question. I don't see how anybody could claim profits against somebody else if he decided for his own reasons to close his own business.

Surely I don't have to say any more about that. It does not matter what you call this case, what technical name you give it, whether you call it a nuisance case. Mr. Hoy raises the question of trespass in the case. The question is whether the de-

fendant's conduct in his logging operation was so unreasonable that it should pay any damages to this plaintiff. Let us look at the facts as they were.

* * * * * * * *

[Endorsed]: Filed May 29, 1947.

[Endorsed]: No. 11650. United States Circuit Court of Appeals for the Ninth Circuit. H. W. Fowler and U. Z. Fowler, Appellants, vs. Crown-Zellerbach Corporation. Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 6, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11650

H. W. FOWLER and U. Z. FOWLER,
Appellants,

vs.

CROWN-ZELLERBACH CORPORATION,
Respondent.

STATEMENT OF POINTS

The appellants on this appeal rely upon the following-mentioned points for reversal of the judgment of the District Court, to-wit:

(1) The Court erred in assuming that under the pleadings in this case the only damages to which the plaintiffs would be entitled would be damages by way of loss of profits to their business as operators of a resort property.

(2) The Court erred in ruling, in effect, that by reason of the fact that the plaintiffs on July 9, 1944, barred the general public from the grounds of their resort and afterwards conducted their business only on the basis of entertaining persons and parties who made special reservations, they waived their right to any damages to their property or property rights inflicted by the action of defendant subsequent to said date.

The appellants say that the only parts of the record which they think necessary for the consid-

eration of these points consist of the following:

(a) The portion of the Pretrial Order which limits the damages of the plaintiffs to loss of income in their business and the reduction of value in their property.

(b) The portion of the transcript of the record, including plaintiffs' offer of proof and that portion of the Court's instructions which limits the plaintiffs' recovery to damages for injuries suffered prior to July 9, 1944, at the hands of the defendant.

(c) The Stipulation entered into between the parties, through their attorneys, on the ..... day of May, 1947, particularly that paragraph of said Stipulation that starts with the words, "It is further hereby Stipulated," and ends with the words "whereas, the plaintiffs, through their counsel, excepted to such ruling and contended that they should be entitled to damages on any wrongful act of the defendant resulting in injury to their property or property rights referred to in the pleadings."

HOY & PRAG,
Attorneys for Appellants.

Due and legal service of the within Statement of Points by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this 11th day of June, 1947.

CAKE, JAUREGUY & TOOZE,
Attorney for Respondents.

[Endorsed]: Filed June 12, 1947.